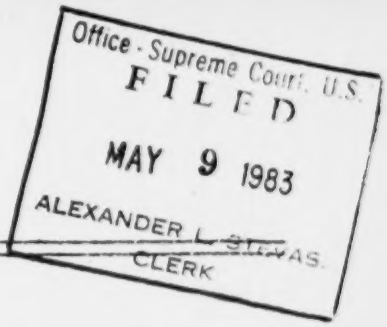
82-1898

CASE NO.



SUPREME COURT OF THE UNITED STATES

October Term, 1982

ROBERT J. KONDRAT

Petitioner

vs.

MELVIN C. SCHAEFER ET AL,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF OHIO, LAKE COUNTY

ROBERT J. KONDRAT, pro se
29121 Chardon Road
Willoughby Hills, OH 44092
Telephone (216) 944 0140

QUESTIONS PRESENTED FOR REVIEW

1) Are the actions of conspiracy and libel and slander within the scope of duties of public officials?

2) Is due process of law and equal protection of the laws denied when inferior courts disregard evidence, rules and procedures?

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CASE NO.

SUPREME COURT OF THE UNITED STATES

October Term, 1982

ROBERT J. KONDRAT

Petitioner

vs.

MELVIN G. SCHAEFER ET AL.

Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF OHIO, LAKE COUNTY

BRIEF OF PETITIONER FOR WRIT OF CERTIORARI

OPINIONS BELOW

The Supreme Court of Ohio in Case No. 83-83 on March 16, 1983 overruled a motion for an order directing the court of appeals to certify its record and sua sponte dismissed the appeal for the reason that no substantial constitutional question existed.

On December 13, 1982, the Eleventh District Court of Appeals of Ohio, in Case No. CA 8-173 affirmed the judgment of the Lake County Common Pleas Court of October 15, 1980 in Case No. 77-CIV-0918 that sustained Respondent's Motion for Summary Judgment.

JURISDICTIONAL STATEMENT

A Petition for Writ of Certiorari is sought of the order and decision of the Supreme Court of Ohio entered March 16, 1983. The statutory provision confered on this court to review the order or decree in question by Writ of Certiorari, is the supremacy clause of the United States Constitution which provides that federal law shall prevail over state and local laws where state or local laws interfers with federal law.

CONSTITUTIONAL STATUTES AND PROVISIONS INVOLVED

The constitutional provision involved is the Fourteenth Amendment which guarantees that no person shall be deprived of life, liberty or property without due process of law and equal protection of laws.

STATEMENT OF THE CASE

Petitioner filed in the court of first instance a Complaint alleging that Respondents, acting in concert, committed libel and slander. The Respondents admitted to the truth of the allegations of acting in concert and libel and slander. The court of first instance rendered decisions, granting Respondent's Motion for Summary Judgment, saying that the actions were within the scope of their duties; and that Petitioner filed no evidence. Prior to the court's decisions, the Petitioner filed a Motion for Default because of failure of a Respondent to provide an Answer. The Petitioner also filed for a Change of Venue. The trial court did not hear Petitioner's Motion for Default or the request for Change of Venue.

Petitioner appealed the trial court's decisions to the Eleventh District Court of Appeals of Ohio, arguing that such actions are not within the scope of duties of public officials; and that due process of law and equal protection of the laws under the Fourteenth Amendment, was denied. The Appellate Court affirmed the Judgment of the trial court.

Petitioner appealed to the Supreme Court of Ohio citing the Fourteenth Amendment, that Petitioner was being denied due process of law and equal protection of the laws. The Supreme Court of Ohio rendered a decision ruling that no substantial constitutional question existed.

ARGUMENT

Because the inferior courts did not apply the same established procedures and rules with the Petitioner as it did with the Respondents, the Petitioner was denied due process of law and equal protection of the laws. The Petitioner has the same right to be heard on his Motions and requests to the courts as is the Respondents; and to have decisions rendered on the evidence in the record and the admission of Respondent's guilt.

Equal is alike; uniform; on the same plane or level with respect to efficiency, worth, value, amount or rights. People v. Hoffman, 116 Ill. 587, 5N.E. 600. Am Rep. 793. The equal protection of the laws of a state is extended to persons within its jurisdiction, within the meaning of the constitu-

tional requirement, when its courts are open to them on the same conditions as to others, with like rules of evidence and modes of procedure, for the security of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; when they are subjected to no restrictions in the acquistion of property, the enjoyment of personal liberty, and the pursuit of happiness, which do not generally affect others; when they are liable to no other or greater burdens and charges than such as are laid upon others; and when no different or greater punishnent is enforced against them for a violation of the laws. State v. Montgomery, 49Me. 192, 47 A. 165. The inferior courts have not been open to Petitioner on the same conditions as to the Respondents, with like rules of evidence and modes of procedure.

CONCLUSION

Its incredible that justice cannot be obtained in our inferior court judicial system despite the fact that there has been an admission to the truth of the allegations; and overwhelming evidence in the

record that substantiates the allegations. If justice is to be derived solely from the whims of individuals who do not take into account the evidence, do not follow rules and procedures, and do not recognize established laws, then there will be no law. Law will only exist as a figment in one's imagination.

Respectfully Submitted,

Robert J. Kondrat, pro se
29121 Chardon Road
Willoughby Hills, OH 44092
Telephone (216) 944 0140
Petitioner

Melvin G. Schaefer, et al.
Byron & Cantor
Attorney for Respondent
Suite 330
36100 Euclid Avenue
Willoughby, OH 44094
Telephone (216) 951 2303

APPENDIX A

OPINION AND JUDGMENT ENTRY

In The

COURT OF COMMON PLEAS

Of Lake County, Ohio

ROBERT J. KONDRAT Plaintiff -vs- MELVIN G. SCHAEFER, ET AL Defendants	) CASE NO. 77-CIV-0918

Plaintiff Kondrat instituted this action as a result of certain statements made by the Defendants Willoughby Hills officials.

In a previous action brought against said officials based on the same statements, the Plaintiff Kondrat did not join the action as a party. Macko v. Byron, Lake County Common Pleas Court Case No. 77-CIV-0620. In that action, the Court determined that the action of the Willoughby Hills officials was within the scope of their duties. Although Kondrat was not a party to that action he is now estopped from litigating that issue which

had been determined. (See Trautwein v. Sorgenfrei 58 O.S. 2d 493 (1979).)

Because the action of the Willoughby Hills officials was within the scope of their duties they had a privilege in making such statements and any action for libel or defamation would be barred. Costanzo v. Gaul, 62 O.S. 2d 106 (1980).

Therefore, the Defendants Motion for Summary Judgment is hereby sustained.

J. WARREN BETTIS, JUDGE

Dated: October 15, 1980

APPENDIX B

OPINION AND JUDGMENT ENTRY

In The

COURT OF APPEALS OF OHIO

ELEVENTH DISTRICT

Of Lake County, Ohio

ROBERT J. KONDRAT	)	CASE NO. CA 8-173
	)	
Plaintiff-Appellant	)	
	)	
-vs-	)	
	)	
MELVIN G. SCHAEFER, ET AL	)	
	)	
Defendants-Appellees	)	

JUDGES: JOSEPH E. O'NEILL,
JOSEPH DONOFRIO,JJ.,
of the 7th Appellate District,
and
William H. Victor, J.,
of the 9th Appellate District,
Sitting by Assignment in the
11th Appellate District

O'Neill, P.J.

On January 13, 1981, the appellant filed a notice of appeal in the office of the Clerk of Courts for Lake County, Ohio. Attached to this notice of appeal was a statement that "Plaintiff-appellant will not submit a Plaintiff-Appellant's Brief be-

cause one has already been filed in this court (November 10, 1980)."

On December 23, 1981, this court notified appellant that no assignments of error and brief had been filed.

On or about December 28, 1981, the appellant furnished us with a brief. In this brief, appellant directs attention to evidence which was denied admission in other cases. This brief does not specifically address itself to the judgment appealed from. The appellant devotes most of his contention to his opinion that the judiciary is schooled in deceit, dishonesty and insincerity. This attitude prevails throughout the trial of this case. When appellant was faced with a motion for summary judgment in the trial court, he did not respond with affidavits. He filed a brief which, in addition to editorialism and unfounded criticism, was unsupported and wandering.

In the face of a motion to dismiss filed by the appellees on November 5, 1981, it was our suggestion that appellant file the brief which he did

file on December 28, 1981. As we have previously pointed out, this brief was of no value as to the merits of the case.

We could but we shall not rise to the unfounded and ignorant criticism of the judiciary and the legal profession as expounded by the appellant. He has seen fit to inject himself into the system of justice without any effective assistance, he has fought or ignored established procedures. When a helping hand is extended, as was done in this case, he bites the hand.

We have reviewed the judgment and proceedings of the trial court and without any assistance from the appellant, we find substantial justice. We affirm that judgment.

Judgment affirmed.
Entry Dated October 23, 1980.

Donofrio, J., concurs.
of the 7th Appellate District
and
Victor, J.,
of the 9th Appellate District,
Sitting by Assignment in the
11th Appellate District

APPROVED:

JOSEPH E. O'NEILL
Presiding Judge.
FOR THE COURT

APPENDIX C

RULING

In The

SUPREME COURT OF OHIO

ROBERT J. KONDRAT	)	To Wit: March 16, 1983
	)	
Appellant	)	No. 83-83
	)	
-vs-	)	
	)	
MELVIN G. SCHAEFER, ET AL	)	
	)	
Appellees	)	

This cause, here on appeal as of right from the Court of Appeals for Lake County, was considered in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to Clerk of the Court of Appeals for Lake County for entry.

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

A P P E N D I X D

Received 12/20/77

IN THE COURT OF COMMON PLEAS

LAKE COUNTY, OHIO

ROBERT J. KONDRAT
29121 Chardon Road
Willoughby Hills, Ohio 44092

Plaintiff

- vs -

BARRY M. BYRON, Esq.
420 Lakeshore Trust Building
State and Main Streets
Painesville, Ohio 44077

MELVIN G. SCHAEFER
c/o Willoughby Hills City Hall
35405 Chardon Road
Willoughby Hills, Ohio 44094

SABBY J. DEFRANK
2824 Orchard Drive
Willoughby Hills, Ohio 44094

ROBERT MOOREHEAD
30151 Eddy Road
Willoughby Hills, Ohio 44094

MORTON O'RYAN
35400 Hanna Road
Willoughby Hills, Ohio 44094

LAWRENCE O'DONNELL
2941 Rockefeller Road
Willoughby Hills, Ohio 44094

GEORGE KRAINCIC
3010 Marcum Road
Willoughby Hills, Ohio 44094

MARILYN MONZULA
2767 Oak Street
Willoughby Hills, Ohio 44094

PAUL MITROVICH
Shoregate Office Building - Suite 200
Wickliffe, Ohio 44092

Defendants

CASE NO. 77CIV0918

THE HONORABLE CLAIR, JR.

FILED
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MELVIN G. REED
CLERK OF COURTS
LAKE COUNTY, OHIO

COMPLAINT WITH JURY DEMAND ENDORSED

* * *

Now comes Plaintiff, ROBERT J. KONDRAT, and for his Complaint states, alleges and avers as follows:

COUNT I

1. At all times material herein, Plaintiff was a circulator and/or signer of recall petitions being circulated and signed by the citizens of Willoughby Hills, Ohio, which petitions sought the removal from office of Defendant Schaefer (Mayor) and Defendants Defrank, Moorehead, O'Ryan, O'Donnell and Kraincic (councilmen). At all times material herein, Defendant Byron was the Law Director for the City of Willoughby Hills; Defendant Monzula was the Clerk of Council for the City of Willoughby Hills; and Defendant Mitrovich was the Prosecuting Attorney for Lake County, Ohio.

2. On or about August 19, 1976, Defendant Schaefer, maliciously and with intent to injure, ridicule and defame Plaintiff, caused to be published in a newspaper known as The Cleveland Plain Dealer the following false material and statements concerning Plaintiff and a group of persons with which Plaintiff was known to associate:

> "Willoughby Hills Mayor, Melvin G. Schaefer, lashed out yesterday at residents circulating recall petitions against him, threatening to sue them over "false charges."
>
> "Schaefer, who took office January 1, said "A small, self-appointed committee of losers" is collecting the signatures to have a vote on ousting him and five councilmen."
>
> "He charged, "They are primarily disgruntled backers of the candidates who lost by large margins in the mayoral and councilmanic elections and are seeking a re-hash of last year's elections."
>
> ***
>
> "The statements are derogatory against me everyone signing those petitions is endorsing those charges. All six are false and those involved can be answerable in a Court of law."

3. Thereafter, Defendant Schaefer continued to characterize Plaintiff and the other circulators and/or signers of said recall petitions as "losers," "sore losers," "mislead citizens," and as persons who were perpetrating fraud and disception upon the citizens of Willoughby Hills. Defendant Schaefer publically accused Plaintiff and other persons circulating and signing said recall petitions under "false pretenses" with "misrepresentations" to the public and

as part of a "witch hunt."

4. The materials so published and the statements so made concerning Plaintiff and others are defamatory and false.

5. At the time of such publication and such statements, Defendant Schaefer knew or could, within the exercise of reasonable care, have known or ascertained that said statements and material was untrue. Furthermore, said Defendant made such statements and published such material willfully and with actual malice toward Plaintiff and others, with an intent to embarrass, ridicule and defame them.

6. By reason of such publication and such subsequent statements, Plaintiff was injured in his reputation, his business, and his credit and was made to suffer great pain, distress and mental anguish to his damage in the amount of One Hundred Fifty Thousand Dollars ($150,000.00).

COUNT II

7. Plaintiff incorporates by reference all of the allegations contained in Paragraphs 1 through 6 of Count I of this Complaint as if fully rewritten herein at length.

8. On or about September 3, 1976, and thereafter, Defendants SCHAEFER, DEFRANK, MOOREHEAD, O'RYAN, O'DONNELL, KRAINCIC and MONZULA did maliciously and with intent to ridicule, defame and injure Plaintiff and others cause to be prepared and to be circulated publicly by United States Mail to the citizens of Willoughby Hills, Ohio, a publication concerning Plaintiff and others, which included the following statements:

> "The mayor and five councilmen stated that the petitions had been circulated with arguments that the recall attempt was merely a vote of confidence for these six officials. They stated that the circulators of the petitions have misled some residents of the city and have obtained signatures under false pretenses. The mayor and five councilmen added that residents who wish to do so may withdraw their names from these petitions by calling the Clerk of Council at Willoughby Hills City Hall, 946-1234, to make necessary arrangements for the removal of their names."

9. With this publication and in subsequent statements made to the news media and openly in council meetings, said Defendants made false and defamatory

statements to the affect that Plaintiff and others had committed an indictable offense involving moral turpitude, which subjects Plaintiff, as an offender, to infamous punishment.

10. Such publication and subsequent statements concerning Plaintiff are false and defamatory. At the time of such publication and statements, said Defendants knew or could, with the exercise of reasonable care, have known or ascertained that the content thereof was untrue and injurious.

11. By reason of such publication and statements, Plaintiff was injured in his reputation, business and credit and suffered great pain, emotional distress and mental anguish to his damage in the amount of One Hundred Fifty Thousand Dollars ($150,000.00).

COUNT III

12. Plaintiff incorporates by reference herein all the allegations contained in Paragraphs 1 through 11 of Counts I and II of the Complaint as if fully re-written herein at length.

13. On or about September 15, 1976, Defendant Byron, maliciously and with intent to ridicule, injure and defame Plaintiff caused to be published by letter certain false statements accusing Plaintiff, and others, of committing an indictable offense involving moral turpitude which subjects Plaintiff to infamous punishment in accordance with the laws of this State. A copy of said letter is attached hereto as Exhibit A and incorporated herein as if fully rewritten at length.

14. On or about September 23, 1976, Defendant, Byron, in concert with the other Defendants named herein except Defendant Mitrovich, maliciously and with intent to injure, ridicule and defame Plaintiff and others read in an open meeting of the City Council of Willoughby Hills the letter attached hereto as Exhibit A.

15. The statements in said letter so published and the words so spoken at said meeting of the City Council were false and defamatory and at the time said statements were made and said letter published, the Defendants except Defendant Mitrovich, and each of them, knew or could, with the exercise of reasonable care,

have known or ascertained that the content thereof was untrue.

16. Said statements and said letter were willfully published by Defendants, and each of them, with actual malice toward Plaintiff.

17. By reason of such letter and such statements, Plaintiff was injured in his business, credit and reputation and was made to endure and suffer great pain, emotional distress and mental anguish, all to his damage in the amount of One Hundred Fifty Thousand Dollars ($150,000.00).

COUNT IV

18. Plaintiff incorporates herein by reference Paragraphs 1 through 17 in Counts I through III of this Complaint as if fully rewritten here at length.

19. On or about December 18, 1976, Defendant Mitrovich, maliciously and with the intent to injure, ridicule and defame Plaintiff caused to be circulated publicly in the newspaper known as The Telegraph a statement to the affect that Plaintiff had committed an indictable offense involving moral turpitude which subjected Plaintiff to infamous punishment. Defendant Mitrovich, while Prosecuting Attorney for Lake County and while criminal charges were pending against Plaintiff in connection with his activities as a recall petition solicitor, stated in connection with Plaintiff:

"This is no minor offense. This is a deliberate kind of thing."

20. The matter so published concerning Plaintiff is false and defamatory. At the time of such publication, said Defendant knew or could, with the exercise of reasonable care, have known or ascertained that the matter was untrue and injurious to Plaintiff.

21. By reason of such publication, particularly by reason of the office held by said Defendant at the time of such publication, Plaintiff was injured in his business, credit and reputation and was made to endure and suffer great pain, emotional distress and mental anguish to his damage in the amount of One Hundred Fifty Thousand Dollars ($150,000.00).

WHEREFORE, with respect to Counts I through III of this Complaint, Plaintiff demands judgment against Defendants Byron, Schaefer, Defrank, Moorehead, O'Ryan, O'Donnell, Kraincic, and Monzula, jointly and severally, in the amount of $450,000.00 for compensatory damages, in the amount of $500,000.00 for punitive damages, along with interest thereon at the maximum rate allowable under law, reasonable attorney fees, and the costs of this action. In addition, with respect to Count IV of the Complaint, Plaintiff demands judgment against Defendant Mitrovich, in the amount of $150,000.00 in compensatory damages, in the amount of $500,000.00 for punitive damages, along with interest thereon at the maximum rate allowable under law, reasonable attorney fees, and the costs of this action.

HERBERT L. BRAVERMAN
Attorney for Plaintiff, Robert J. Kondra
Three Commerce Park Square - #715
Cleveland, Ohio 44122
464-7000

JURY DEMAND

The Plaintiff demands a jury trial of all issues.

HERBERT L. BRAVERMAN
Attorney for Plaintiff, Robert J. Kondra

September 15, 1976

Honorable Ted W. Brown
Ohio Secretary of State
State House
Columbus, Ohio 43215

Re: City of Willoughby Hills, Removal Recall Petitions

Attention: Elections Office

Dear Mr. Brown:

On September 2, 1976 petitions demanding the "immediate recall and removal" of the Mayor and five (of seven) councilmen of the City of Willoughby Hills, Ohio were filed with the Clerk of Council. For a variety of reasons, these petitions have been determined to be invalid by the Clerk pursuant to the Willoughby Hills City Charter.

In connection with the conduct of procedures necessary to determine the validity of the subject petitions, City officials have uncovered information leading to the following preliminary conclusions, co-wit:

1) Systematic and deliberate misrepresentations were made to prospective signers of the petitions concerning their content and legal effect in violation of Section 3599.14 of the Revised Code of Ohio.

2) Misrepresentations of fact were made in attempting, sometimes successfully, to influence citizens to sign these petitions. These misrepresentations were to the effect that an "area shopping center" and a large discount store were proposed and authorized by the Mayor and City Council for future construction and operation in Willoughby Hills. There are no such proposals. City officials have evidence that residents were persuaded to sign these petitions because of these misrepresentations. These misrepresentations of fact were widespread and apparently orchestrated by prior design.

These facts tend to show a violation of Section 3599.14 of the Revised Code and suggest the possibility of violations of those sections of Chapter 29 (the Ohio Criminal Code) relating to criminal complicity.

3) Signers were permitted by the circulators of the petitions to sign more than once in violation of Section 3599.13 of the Ohio Revised Code.

4) Persons unqualified to sign were knowingly permitted by the circulators of the petitions to sign their names in violation of Section 3599.13 of the Ohio Revised Code.

5) A person was permitted by a circulator to sign a name other than her own in violation of Section 3599.13 of the Ohio Revised Code; the circulator who obtained the forged signature then made a false affidavit concerning the forged signature in violation of Section 3599.14 of the Ohio Revised Code.

6) Part petition papers were filed with the Council Clerk which contained a forgery in at lease one instance thus far discovered in violation of Section 3599.14 of the Ohio Revised Code.

Because these violations appear to be widespread and systematic it is my judgment that a thorough investigation of these apparent irregularities is necessary.

Please consider this letter as the request by my office that you, as chief election officer of the state, undertake an investigation of these irregularities pursuant to the provisions of Section 3501.05 (M) of the Revised Code. I appreciate that this is a busy time of year for your office, however, the public interest would best be served by prompt investigation and, if warranted, prosecution of all guilty parties involved. You are assured of the full cooperation of the Willoughby Hills City Administration with your representatives in this investigation.

Pending final determination of this matter by prosecuting authorities, I have instructed the Clerk to impound these petitions and to permit no inspection of them.

The favor of an early reply is respectfully requested.

Very truly yours,

Barry M. Byron
Law Director
City of Willoughby Hills, Ohio

MB/m

EXHIBIT A, Page 2

cc: Board of Elections of Lake County

IN THE COURT OF COMMON PLEAS

LAKE COUNTY, OHIO

ROBERT J. KONDRAT Plaintiff -vs- MELVIN G. SCHAEFER, et al. Defendants	)	CASE NO. 77 CIV 0918 MOTION FOR DEFAULT JUDGEMENT

LAKE CO. CLERK OF COURTS
FILED
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Plaintiff moves the court for the entry of a default judgement, in the amount as asked for in the COMPLAINT (in the amount of $450,000 for compensatory damages, in the amount of $500,000 for punitive damages), plus interest, costs and attorneys fees, because of the Defendant Ms. Marilyn Monzula's failure to ANSWER or otherwise defend as provided by the Civil Rules, and that the Defendant is neither incompetent nor minor , nor a Defendant in the military service of the United States.

Respectfully submitted,

ROBERT J. KONDRAT
Plaintiff

SERVICE

A copy of the foregoing MOTION FOR DEFAULT JUDGEMENT has been served upon Ms. Marilyn Monzula, Willoughby Hills City Hall, 35405 Chardon Road, Willoughby Hills, Ohio 44094, by mailing same by Pd ~ 6840881 certified U.S. Mail, postage pre-paid, on this 9th day of October, 1980.

Robert J. Kondrat, Plaintiff

cc: News Media

FILED
COURT OF APPEALS
OCT 23 1980
ANDY J. TOTH
CLERK OF COURT
LAKE COUNTY, OHIO

IN THE COURT OF COMMON PLEAS

LAKE COUNTY, OHIO

ROBERT J. KONDRAT
29121 Chardon Road
Willoughby Hills, OH 44092

Plaintiff-Appellant

-vs-

MELVIN G. SCHAEFER, ET AL.
35405 Chardon Road
Willoughby Hills, OH 44094

Defendant-Appellees

CASE NO. 77 CIV 0918

NOTICE OF APPEAL

Notice is hereby given that Robert J. Kondrat, Plaintiff-Appellant, hereby appeals to the Eleventh District Court of Appeals, the JUDGMENT ENTRY of Defendant-Appellees' MOTION FOR SUMMARY JUDGMENT, for the captioned case, entered in this action on the 15th day of October, 1980, by Judge J. Warren Bettis, Lake County Courthouse.

Robert J. Kondrat

SERVICE

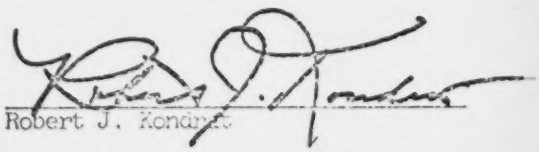
A copy of the foregoing NOTICE OF APPEAL was mailed this 20th day of October, 1980, to Barry Byron, 330 Lake West Medical Bldg., 36100 Euclid Ave., Willoughby, OH 44094, by regular first class mail, U.S. postage prepaid.

Robert J. Kondrat

Assignment of Error attached
cc: News Media

ASSIGNMENT OF ERROR

Plaintiff-Appellant asks that the court reverse the lower court's JUDGMENT ENTRY sustaining the Defendant-Appellees' Motion for Summary Judgment, because the actions of the Willoughby Hills officials was NOT within the scope of their duties nor were they privileged in making such statements, as was Opinionated by the lower court. Conspiracy has never been within the scope of any public officials duties.



Robert J. Kondrat

IN THE COURT OF APPEALS

LAKE COUNTY, OHIO

ELEVENTH DISTRICT

CASE NO. 8-134

FILED
COURT OF APPEALS
NOV 10 1980
ANDY J. TOTH
CLERK OF COURT
LAKE COUNTY, OHIO

ROBERT J. KONDRAT
29121 Chardon Road
Willoughby Hills, OH 44092
Telephone (216) 944-0140

Plaintiff-Appellant

-vs-

MELVIN G. SCHAEFER, ET. AL.
35405 Chardon Road
Willoughby Hills, OH 44094

Defendants-Appellees

PLAINTIFF-APPELLANT'S BRIEF

ROBERT J. KONDRAT, Pro Se
29121 Chardon Road
Willoughby Hills, OH 44092
Telephone (216) 944-0140

BARRY M. BYRON
Attorney for Appellees
Byron & Cantor
Suite 330
36100 Euclid Avenue
Willoughby, OH 44094
Telephone (216) 951-2303

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APPENDIX

B.M. Byron's letter of September 15, 1976.....EXHIBIT A

Four Pages of Trial Transcript, Case No. 76 CR 473.....EXHIBIT B

ASSIGNMENT OF ERROR

Plaintiff-Appellant asks that the court reverse the lower court's JUDGMENT ENTRY sustaining the Defendant-Appellees' Motion for Summary Judgment, because the actions of the Willoughby Hills officials was NOT within the scope of their duties nor were they privileged in making such statements, as was Opinionated by the lower court. Conspiracy has never been within the scope of any public officials duty.

STATEMENT OF THE CASE

The Plaintiff-Appellant on December 15, 1977, in the Court of Common Pleas, in Lake County, filed a complaint alleging the Defendant-Appellees, that on or about September 15, 1976, the Defendant-Appellees, maliciously and with intent to ridicule, injure and defame Plaintiff-Appellant caused to be published by letter certain false statements accusing Plaintiff, and others, of committing an indictable offense involving moral turpitude which subjects Plaintiff-Appellant to infamous punishment in accordance with the laws of this State.

And, on or about September 23, 1976, the Law Director of the City of Willoughby Hills, in concert with others, maliciously and with intent to injure, ridicule and defame Plaintiff, and others, read in an open meeting of the City Council of Willoughby Hills, the letter of September 15, 1976.

A hearing was held in Lake County Court House. Visiting Judge J. Warren Bettis heard argument and later returned an OPINION sustaining the Defendant-Appellees Motion for Summary Judgment, for the reason that the action of the Willoughby Hills officials was within the scope of their duties.

ARGUMENT

Section 8.31 of the City of Willoughby Hills Charter states in part, the following :

> "If any petition be found insufficient or incorrect in form or substance, the petitioners shall be notified of the findings, including what particulars have been found defective. Any petition may be amended at anytime within a ten (10) day grace period after the notification and refiled upon additional forms in the manner provided for filing the original, including the repayment of filing fees, if any."

(1.) Date of Publication of Defendant's false accusations.

(2.) Date on which Defendant's false accusations were spoken.

(3.) Date on which petitions were filed.

* This calendar of September, 1976 was barred from use in a trial by Judge Parks in the case of Macko v. Byron, Lake County Common Pleas Court, Case No. 77 CIV 0620. Why would a Judge object to a jury seeing this?

The above calendar of events diagrams the Defendants' conspiracy to have Plaintiff indicted, arrested, jailed and made to stand trial. This segment of the conspiracy will deal only with the Defendants' false accusations.

The requirements for amending petitions are set forth in the first paragraph of the ARGUMENT. Diagrammed numbers 1 and 2 sets forth the dates on which the Defendants' false statements were printed and spoken. Number 3 sets forth the date on which the petitions were filed.

It's obvious to any viewer of this calendar, that the Defendants had knowledge of alleged petition defects during the petitioning period (See diagrammed Nos. 1 and 2, and EXHIBIT A). It's a fact that alleged petition defects were to be made known to the petitioners so that petitions could be amended (See 1st par. of ARGUMENT). It's a fact that Plaintiff was not notified of any alleged defects (See State of Ohio vs. Robert Kondrat, Case No. 76 CR 473, Lake County Common Pleas Court, EXHIBIT B). It's a fact that Plaintiff, and others, were indicted and arrested for alleged petition defects. It's a fact that the Defendants' false accusations were to fabricate criminal activity against Plaintiff and others (Again see State of Ohio vs. Robert Kondrat). It's a fact that the Defendant-Appellees have not presented any evidence to substantiate the truth of the Defendants' statements. The only material presented by the Defendants thus far has been the fabricated criminal activity against Plaintiff, which a criminal trial court has already recognized as being just that and ruling that it is not admissable in a court of law.

To all of the above the lower court has said:

> "Because the action of the Willoughby Hills officials was within the scope of their duties, they had a privilege making such statements and any action for libel or defamation would be barred."

Conspiracy has never been in the scope of duties of a governmental body, nor do its officials have the privilege of making false accusations for the

purpose of conspiring to fabricate criminal activity. It was the duty of the Willoughby Hills officials to notify Plaintiff of any alleged petition defects, as required by the City Charter. In not doing so, the officials acknowledged that there were no defects, thus branding their statements as false. It's obvious that there could not be any truth to any Defendants accusations made prior to the September 24, 1976 date, for the simple reason that the petitioners still had the opportunity to amend any petition, providing they were notified of the particulars as required by City Charter.

The Plaintiff's subsequent indictment, arrest, jailing and trial for alleged petition defects resulted from the Defendants' conspiratorial scheme of fabricating criminal activity. As indicated by the calendar, the Defendants had knowledge of supposedly alleged petition defects. They did not communicate this knowledge to the Plaintiff, or others, as required by City Charter. Instead, they waited until the petitioning period was over, then brought forth the false accusations and sought indictments. The lower court's decision said that such action by the officials is within the scope of their duties. A criminal court trial has already said No, and the Plaintiff now says NO.

For this court's information, conspiracy has been defined as follows (emphasis added):

1) "A consultation or agreement between two or more persons, either falsely to accuse another of a crime punishable by law; or wrongfully to injure or prejudice a third person, or any body of men, in any manner; or to commit any offense punishable by law; or to do any act with intent to prevent the course of justice; or to effect a legal purpose with a corrupt intent, or by improper means. Hawk.P.C. c72 S 2; Arch b. Crim. Pl. 390. State v. Murphy, 6 Ala. 765, 41 Am. Dec. 79."

2) "The essence of conspiracy is an agreement, together with an overt act, to do an unlawful act, or do a lawful act in an unlawful manner. Cooper v. O'Connor, 99 F. 2d 135, 142, 69 App D.C. 100, 118 A.L.R. 1440."

The aformentioned facts of the Defendant-Appellees conspiratorial scheme are diagrammed and given. The conspiracy's object was to injure Plaintiff-Appellant. Its accomplishments were the secret indictments, arrest, incarceration and trial of the Plaintiff-Appellant.

CONCLUSION

The inability and/or refusal of the judiciary to relate to the simplest of facts, and use common sense, places the judicial system beyond the reach of those for whom this body is to serve. Whether this is done intentionally or not does not matter now. What matters is the fact that the judicial system has been a total failure.

This failure is reflected not only in this case, but at every level of life where the judicial, and its companion brother the legal profession, are entrenched and voice decisions that satisfy their own interests. This is contrary to the principals and tradition established by the Constitution of the United States.

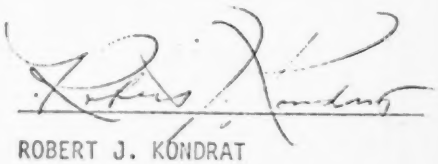
Understandably, the administrators of justice are schooled and brought through the ranks where deceit, dishonesty and insincerity are prevalent. These tools are essential to a profession that must pit one against another, like contestants in an arena, so that the spoils may be reaped. Without these tools, the judicial administrators would not be able to justify their existence.

But, unfortunately, the havoc this group exerts upon a productive society does not stop with the taking of the spoils. The contests arranged by the judiciary invariably become tainted with corruption. This barbutoism does not go unnoticed by the people. These same people are left with a feeling of helplessness, discontentment, frustration and without a sense of direction. Eventually, confidence is eroded.

Even the uniqueness of the judicial/legal brotherhood, who have the power and ability to conceal their purpose, and to protect their own, is laid bare when this body must probe the infinite darkness of the law to escape confrontation with reality. Such judicial behavior is not only a disgrace to our flag but is useless to humanity.

This court is asked to relate itself to simple facts, such as a calendar, and to the occurence of events aforementioned, and then to use just plain common sense to arrive at a decision reversing the lower court's decision. The relief sought is the same as stated in the complaint.

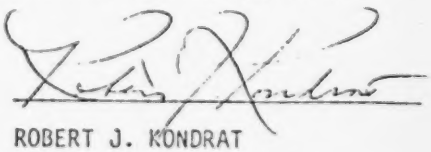
Respectfully Submitted,



ROBERT J. KONDRAT

SERVICE

A copy of the foregoing PLAINTIFF-APPELLANT'S BRIEF was mailed this 4th day of Nov, 1980, by regular U.S. mail, postage prepaid, to Barry M. Byron, 330 Lake West Medical Bldg., 36100 Euclid Avenue, Willoughby, OH 44094.
Resubmitted 12/28/81. RJK



ROBERT J. KONDRAT

cc: News Media
Attorney General of the U.S

FILED
COURT OF APPEALS
NOV 5 1982
ANDY J. IOTIN
CLERK OF COURT
LAKE COUNTY, OHIO

IN THE COURT OF APPEALS

ELEVENTH DISTRICT

LAKE COUNTY, OHIO

ROBERT J. KONDRAT Plaintiff-Appellant -v- MELVIN SCHAEFER, ET AL Defendant-Appellees	)	CASE NO. CA 8-173 APPELLANT'S INQUIRY TO THE COURT NO.3 AND MOTION FOR SUMMARY JUDGMENT

NOV [illegible]

In August, 1982 the Appellant requested of the court to furnish information as to when the court could be expected to act on the captioned case. As yet, there has been no response.

Since the Appellees have already admitted to the truth of the allegations, Appellant asks that the court grant an immediate Summary Judgment, as specified in the Complaint.

Robert J. Kondrat

SERVICE

Copies of the foregoing INQUIRY NO. 3 AND MOTION FOR SUMMARY JUDGMENT have been sent by regular first class mail, postage prepaid, on this 2nd day of November, 1982, to the following:

U.S. Attorney General Smith
The Department of Justice
Washington, D.C. 20530
(CERTIFIED RRR #P17 5878518)

Office of The Clerk
U.S. District Court
Cleveland, OH 44114
(TO BE FILED AND MADE A MATTER
OF RECORD IN CASE NO. C82-896)

Byron & Cantor
36100 Euclid Avenue
Willoughby, OH 44094

cc: News Media

Baker & Hostetler
3200 Nation City Center
Cleveland, OH 44114

Albert L. Bell
Ohio State Bar Association
33 W. 11th Avenue
Columbus, OH 43201

McNamara, Gemperline & Wager Co.
Suite 608 Mall Bldg., 118 St. Clair Ave.
Cleveland, OH 44114

James Sweeney
630 Bulkley Building
Cleveland, OH 44115

NOTICE OF APPEAL TO THE SUPREME COURT OF OHIO

FROM

THE COURT OF APPEALS, EVEVENTH APPELLATE DISTRICT

APPELLATE COURT CASE NO. CA 8-173

FILED
COURT OF APPEALS
JAN 4 1983
ANDY J. TOTIN
CLERK OF COURT
LAKE COUNTY, OHIO

ROBERT J. KONDRAT	)	CASE NO.
Plaintiff-Appellant	)	
vs.	)	NOTICE OF APPEAL
MELVIN G. SCHAEFER, et al,	)	
Defendant-Appellees	)	

RECEIVED
JAN

Plaintiff-Appellant gives NOTICE OF APPEAL to the Supreme court of Ohio from the OPINION AND JUDGMENT ENTRY entered in the Court of Appeals, Eleventh District, on the 13th day of December, 1982. The case did not originate in the Court of Appeals; and the case is one that involves a substantial Constitutional question.

Respectfully Submitted

Robert J. Kondrat
29121 Chardon Road
Willoughby Hills, OH 44092

S E R V I C E

Copies of the foregoing NOTICE OF APPEAL were mailed this 3rd day of January, 1983, by U.S. mail, postage prepaid, to the following:

United States Attorney General Smith
The Department of Justice
Washington, D.C. 20530

CERTIFIED RRR #P 287 316 114

Office of the Clerk
United States District Court
Cleveland, OH 44114

(TO BE FILED AND MADE A MATTER OF RECORD IN CASE NO. C82-696)

IN THE SUPREME COURT OF OHIO

COLUMBUS, OHIO

CASE NO. ____ 83-83

***

ON APPEAL FROM THE ELEVENTH JUDICIAL DISTRICT

SUMMIT COUNTY

CASE NO. CA 8-173

***

CASE ORIGINATING IN LAKE COUNTY COMMON PLEAS COURT

LAKE COUNTY

CASE NO. 77 CIV 0918

FILED
JAN 18 1983
SUPREME COURT OF OHIO
THOMAS J. CLARIZMAN Clerk

****

ROBERT J. KONDRAT,

Plaintiff-Appellant

-vs-

MELVIN G. SCHAEFER, ET AL,

Defendant-Appellees

MEMORANDUM OF JURISDICTION
AND
APPELLANT'S BRIEF

****

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JAN 21 1983

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STATEMENT OF FACTS AND/OR CASE

Plaintiff-Appellant (Appellant) filed in the originating court a Complaint alleging that Defendant-Appellees (Appellees) committed libel and slander. Nine Defendants were named in the multi-party action. A court decision in the first court fragmented the case into two cases. One with eight Defendants, and another with one Defendant. We are concerned here with the case having eight Defendants.

The trial court in its first opinion dismissed Defendant Byron. Motions for dismissal of other Defendants were overruled. Appellant's two requests for continuance were overruled. Appellant filed Motion for Default because of Defendant Monzula's failure to answer. Appellant then filed for Change of Venue. The court then in its Opinion and Judgment Entry sustained the Defendants' Motion for Summary Judgment; and remained silent on Appellant's Motion for Default, and on Appellant's filing for Change of Venue.

Appellant appealed the Summary Judgment Opinion to the Eleventh District Court. The trial court then granted Defendant Monzula Leave to File her Answer. This Leave coming nearly four years after filing of Appellant's Complaint. Appellant questioned the propriety of the court's judgment due to the time span involved, and because the judgment was typed on the stationery of the law offices of Byron & Cantor and postmarked Lisbon, Ohio. Thereafter, the trial court with its Judgment Entry, granted Defendants' Motion for Summary Judgment, coming again on the stationery of the law offices of Byron & Cantor.

Appellant also appealed the trial court's second Summary Judgment decision to the Eleventh District Court of Appeals. As reason for the appeal, the Fourteenth Amendment was cited. As a point of clarification to this court, there

were now two appealed decisions before the Appellate Court on the same case. The reason for this was because both decisions appeared to be adverse to the Appellant, and the Appellant not being an attorney, was not certain whether both had to be appealed. So to be on the safe side, both decisions were appealed.

An Appellant's Brief was filed on the first appeal. None was submitted with the second appeal and the Appellate Court's attention was directed to the fact that one had already been submitted with the first appeal. The Appellate Court indicated that none was in the record, and the Appellant's Brief was then re-submitted a second time. In the first appeal, the Appellate court sustained Appellees' Motion for Dismissal for the reason that the entry appealed from was not a final appealable order. On the second appeal which came nearly a year after resubmission of Appellant's Brief, the Appellate Court affirmed the judgment of the trial court.

ARGUMENT

The record shows that the Appellees have admitted to the truth of the allegations of libel and slander. Also in the record, is the evidence. But, despite the conclusive proof of guilt, the Appellate Court has ruled against the Appellant saying that "Appellant has injected himself into the system without any effective assistance and has fought or ignored established procedures, and when a helping hand is extended, as was done in this case, he bites the hand".

First of all, the Appellant did not inject himself into the system. The Appellant was dragged into the system by the system's unscrupulous members who thought they could get away with something. These members thought that they could commit modern day tyranny and hide behind the judicial cloak. So far they have been successful.

Secondly, the Appellant did seek effective assistance. But due to fear of counsel's career by becoming involved in litigation stemming from the Recall of public officials, competent assistance could not be had. Consequently, the Appellant had to represent himself. Appellant did not wish this upon himself. The Appellant is no attorney and the courts have known this. Appellant has not fought or ignored established procedures. Appellant has, to the best of his knowledge, tried to conform with established procedures. Appellant's communication with the courts that arein the record, shows that Appellant has tried to be as cooperative as possible. If anything, it has been the courts which appear to have ignored established procedures. The Appellant is a layman who is not skilled in law and must be accepted in his unconventional ways.

The Appellate Court has made a big ado about Appellant's Brief which was not, and then was furnished. Appellant did not know that a resubmission of this pleading was required. It was assumed that whatever was in the record need not be presented again. Isn't this a logical assumption to make? This is not fighting or ignoring procedures as the court contends. It would appear that it was the court who circumvented procedures by remaining silent for so long after it had been informed that there would be no Appellant's Brief.

The Appellate Court in its opinion stated that "when Appellant was faced with a Motion for Summary Judgment, he did not respond with affidavits". Frankly, the Appellant does not understand the purpose of affidavits or why they are required in some pleadings and not in others. Presumably, the affidavit question will always remain a mystery to Appellant.

The Appellate Court indicated that Appellant's Brief, "in addition to editorialism and unfounded criticism, was unsupported and wandering". The court should recognize the fact that Appellant is no attorney. If his brief

editorializes, criticizes, wanders or is unsupported, it does so because he has not had the training to present it in the fashion wanted by the court. The Appellant has presented it the best way known to him, and as a layperson would. It's unfortunate that the court is unable to cope with plain common sense. But neither is the Appellant capable of understanding a garbled English spiced with foreign words as used by the courts and legal profession. If Appellant's ways are not suited for the court, or if something is stated which offends the court, then the Appellant regrets that he can't do better. However, the Appellant intends to say it as he sees it. If the truth hurts, it will have to be borne. For it was the courts and the legal profession which brought this upon themselves. If there was any editorialsm, criticism, unsupported and wandering dialogue, then one only needs to look at the lower courts' opinions.

The Appellate court stated that "we could but we shall not rise to the unfounded and ignorant criticism of the judiciary and the legal profession as expounded by the Appellant". The Appellant's response to this is: what makes the judiciary and the legal profession so sacred that it is beyond the bounds of criticism? Those members who are un-American, abuse their code of ethics, steal or commit other unlawful acts, are no different than anyone else, and are to be treated the same as everyone else is. Just because the judiciary and legal profession are from the same family, does this mean that they can do no wrong? The Appellant will criticize those members who do not act in the American way of life, and will criticize those professions who aid and abet its members and do not act to clean its own house.

The Appellate Court stated that "when a helping hand is extended, as was done in this case, he bites the hand". If there was a helping hand extended, then the Appellant sure missed it. Exactly where was this done? If there was a hand, it was extended in the other direction.

Also, in the Opinion of the Appellate Court, the court is quoted as saying that "the Appellant devotes most of his contention to his opinion that the judiciary is schooled in deceit, dishonesty and insincerity". Is the Appellant to understand that the judiciary receives no training in deceit, dishonesty and insincerity? These are some of the very common denominators which bring about the day to day activity in our courts. Without some understanding of what these are, how can the judiciary be expected to cope with the problems they are faced with? Appellant has not attended law school, but it would seem incredible that no such training is given. If there is none, then it would appear that our judicial officers are not equipped for the job they are doing and, that they are where they are simply because they have been able do a good selling job on someone.

The Appellate Court's Opinion was a weak attempt at whitewashing the alleged libel and slander suit. Instead of dealing with the issue and the evidence in the record, the Appellate Court tried to draw attention away from the case by attacking the Appellant. The tone of the Opinion is evident; and the points of contention raised by the court are not even that relevant to the case. Generally, such a mood can be expected when there is a lack of substantial argument to draw conclusions in the proper judicial vein. In other words, when beaten, resort to ridicule and character assination as a means of achieving the desired end. These have been favorite and effective tools used many times.

This case is appealed for the reason that there was a denial of due process of law and the equal protection of the laws. This right is guaranteed by the Fourteenth Amendment of the United States Constitution. The jurisdiction of this court lies in the inferior court clause of the U.S. Constitution which extends judicial power to inferior courts in all cases, in law and equity, that arise under the U.S. Constitution. Jurisdiction also lies in Article I,

the Bill of Rights of the Ohio State Constitution.

The fact that the courts did not apply the same established procedures with the Appellant as it did with the Appellees is a discrimination in the administration of justice and a denial of due process and equal protection of the laws. The fact that the trial court remained silent on Appellant's Motion for Default; remained silent on Appellant's Change of Venue; remained silent to many of Appellant's inquires and communications; and the attitude of the Appellate Court which is apparent, cannot be considered as being equal, and the record will show it.

Equal is alike; uniform; on the same plane or level with respect to efficiency, worth, value, amount, or rights. People v. Hoffman, 116 Ill. 587, 5N.E. 600. Am Rep. 793. The equal protection of the laws of a state is extended to persons within its jurisdiction, within the meaning of the constitutional requirement, when its courts are open to them on the same conditions as to others, with like rules of evidence and modes of procedure, for the security of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; when they are subjected to no restrictions in the acquisition of property, the enjoyment of personal liberty, and the pursuit of happiness, which do not generally affect others; when they are liable to no other or greater burdens and charges than such as are laid upon others; and when no different or greater punishment is enforced against them for a violation of the laws. State v. Montgomery, 94Me. 192, 47 A.165. The lower courts have not been open to Appellant on the same conditions as to the Appellees, with like rules of evidence and modes of procedure.

This is another case of the courts continuing prejudiced conduct as practiced against a non-ABA litigant.

The court is asked to reverse the lower court's decision.

No. 82-1898

Supreme Court of the United States

October Term, 1982

ROBERT J. KONDRAT,
Petitioner,

vs.

MELVIN G. SCHAEFER, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where a group of people, excluding Petitioner, have filed a defamation suit against Respondents, and the court has determined that Respondents are to be afforded the absolute defense of truth of the statements made, is Petitioner estopped from bringing a similar suit against Respondents based on the same allegations?
2. When the statements attributed to Respondents were made within the scope of their official duties during the course of council meetings and were relevant to the subject then under discussion, are the statements absolutely privileged so as to bar a suit for defamation based thereon?
3. Where the trial court makes decisions within its vested discretion, is Petitioner denied equal protection and due process of law absent a showing of prejudice?

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I. Insofar as the issue of defamation was adjudicated in an earlier suit, Petitioner's suit is barred under the doctrine of *res judicata* 7

II. The claimed defamatory statements attributed to Respondents were made within the scope of their official duties during the course of council meetings, were relevant to the subject then under discussion, and were absolutely privileged 9

III. Petitioner was not denied due process and equal protection of the law by the trial court 11

A. The trial court did not abuse its discretion in allowing Respondent Monzula to file her answer instanter and thus did not deny Petitioner equal protection and due process of law 11

B. When Respondents were awarded summary judgment, the issue of venue became moot and there was no need for the court to rule on Petitioner's motion. Thus, Petitioner was not denied equal protection or due process of law 12

Conclusion 13

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Ohio Civil Rules of Procedure:

Rule 36(A) A1
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Journal Entry and Opinion of the Court of Appeals of Cuyahoga County, Ohio in *Lawrence J. Flynn v. John D. Relic, et al.* A10

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36(A) 8

No. 82-1898

Supreme Court of the United States

October Term, 1982

ROBERT J. KONDRAT,
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Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The Ohio Supreme Court in Case No. 83-83 on March 16, 1983, overruled Petitioner's Motion for an order directing the Court of Appeals for Lake County, Ohio, to certify its record, and *sua sponte* dismissed Petitioner's appeal for want of a substantial constitutional question.

On December 13, 1982, the Eleventh District Court of Appeals of Ohio, in Case No. 8-173, affirmed the Summary Judgment granted by the Lake County Common Pleas Court on October 17, 1980 in Case No. 77-CIV-0918.

JURISDICTIONAL STATEMENT

Petitioner filed a Petition for a Writ of Certiorari on May 9, 1983, pursuant to 28 U.S.C. §1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

No constitutional issues were raised or argued by Petitioner in the courts below.

STATEMENT OF THE CASE

Procedural Posture

Plaintiff-Petitioner (hereinafter Petitioner) filed a libel and slander action against various public officials of the City of Willoughby Hills and the Lake County Prosecuting Attorney. Named as defendants (hereinafter Respondents) were the Willoughby Hills Mayor (Schaefer), the City Law Director (Byron), the Clerk of Council (Monzula) and some of the members of City Council (DeFrank, O'Ryan, O'Donnell and Kraincic). All Respondents moved to dismiss the Complaint on various grounds. Petitioner filed briefs in opposition to the motions and reply briefs were filed by Respondents.

On March 8, 1978, Petitioner's counsel withdrew and Petitioner thereafter represented himself.

The Ohio Supreme Court, on March 27, 1978, authorized a judge from another county to preside over the case, the Honorable J. Warren Bettis.

On May 26, 1978, the court granted Petitioner thirty days to amend Counts I and II of the Complaint, granted

the Motion to Dismiss the City Law Director (Byron) and denied the Motion to Dismiss the County Prosecutor (Mitrovitch).

On June 2, 1978, a Notice of Appeal was filed concerning the granting of the Motion to Dismiss as to Law Director Byron.

On June 7, 1978, Petitioner amended Counts I and II of the Complaint.

On June 13, 1978, all the Willoughby Hills officials filed a Motion to Dismiss the Amended Complaint.

After obtaining leave of court, Respondent County Prosecutor Mitrovich filed his answer on July 31, 1981, and a Motion to Dismiss on August 7, 1978.

On September 15, 1978, Petitioner's Notice of Appeal was dismissed on the basis that the appeal was not taken from a final appealable order.

On September 29, 1978, the County Prosecutor's Motion to Dismiss was overruled.

Also on September 29, 1978, the court granted the Motion to Dismiss of Law Director Byron and found no just reason for delay.

Petitioner filed a notice of appeal on October 13, 1978, and the case was assigned Case No. 7-047 in the Court of Appeals.

Petitioner then filed a reply brief to Respondent Mitrovich's answer on October 26, 1978.

On February 20, 1979, the Respondent Willoughby Hills' Motion to Dismiss the Amended Complaint was overruled.

On February 27, 1979, a joint Answer was filed by Respondents Schaefer and the Willoughby Hills Council mem-

bers. No answer was filed on behalf of Respondent Monzula.

Requests for Admission were served on Petitioner.

The Court of Appeals reversed the dismissal of Respondent Byron in Case No. 7-047 and an Answer was filed within the trial court in his behalf on May 3, 1979.

A combined request for discovery, including Interrogatories, Requests for Admission and Request for Production of Documents (Second Set) was sent to Petitioner on May 6, 1980.

On May 12, 1980, Petitioner responded to the discovery.

A Motion for Summary Judgment was filed on behalf of all Willoughby Hills officials including Respondent Monzula on September 4, 1980. Petitioner opposed the Motion.

Petitioner filed a Motion for Default Judgment as to Respondent Monzula on October 9, 1980, and a Motion for Change of Venue on October 14, 1980.

A motion for leave to file an answer on behalf of Respondent Monzula instanter was granted on October 17, 1980, and an answer was filed.

The Motion for Summary Judgment as to all Willoughby Hills officials including Monzula was granted on October 17, 1980.

On October 22, 1980, Petitioner filed a Notice of Appeal in Case No. CA 8-134.

On January 2, 1981, the court found no just reason for delay in granting summary judgment as to the Willoughby Hills officials. Petitioner filed another appeal in Case No. CA 8-173.

On April 27, 1981, the Court of Appeals granted a Motion to Dismiss Case No. CA 8-134 for its failure to be an appeal from a final appealable order.

The Court of Appeals in CA 8-173 affirmed the decision of the trial court on December 13, 1982.

Petitioner then filed a memorandum in support of jurisdiction in the Ohio Supreme Court. On March 16, 1983, the Ohio Supreme Court overruled Petitioner's motion for an order directing the Court of Appeals to certify its record and *sua sponte* dismissed Petitioner's appeal for want of a substantial constitutional question in Case No. 83-83.

STATEMENT OF FACTS

The backdrop of the Complaint filed by Petitioner stems from an attempted recall of elected officials within the City of Willoughby Hills, Ohio.

The Complaint alleged in Count I, that on August 19, 1976, a newspaper published statements attributed to Respondent Schaefer, Mayor of Willoughby Hills, that circulators of the recall petitions were "a small self-appointed committee of losers," allegations within the circulated recall petitions were false and that the circulators of petitions were endeavoring to mislead the citizens.

Count II referred to a September 3, 1976 communication from the Willoughby Hills officials that the petition circulation had misled some residents and the communication further explained how names could be withdrawn from the part-petitions.

Count III referred to a September 15, 1976 letter from Law Director Byron to the Ohio Secretary of State regarding a request for an investigation into irregularities in the

petition circulation process. The letter was read at an open City Council meeting on September 23, 1976.

In response to Respondents' Motion to Dismiss, the court gave Petitioner leave to Amend Counts I and II of the Complaint within thirty days to show that a conspiracy to commit defamation had occurred to bring the allegations within the statute of limitations.

The Amended Complaint had five separately numbered paragraphs.

On December 18, 1976, Respondent Byron was alleged to have been quoted that deliberate misrepresentations had occurred in the recall drive.

On December 22, 1976, Petitioner alleged a newspaper quoted Law Director Byron as claiming that incidents of forgery and perjury were being contended by City officials.

On December 26, 1976, Mayor Schaefer is alleged to have made a telephone call to Thomas Sweeney, Petitioner's supervisor, at Petitioner's place of employment, to complain about Petitioner and make derogatory remarks about Petitioner.

In paragraph 4, Petitioner alleged that on March 25, 1977, a newspaper article quoted Law Director Byron as saying that funds expended in defense of the recall effort should be recouped. Petitioner then alleged that this statement was made to discredit, harass and continue the defamatory action.

Finally, in paragraph 5, Petitioner alleges that on February 23, 1978, Councilman O'Ryan made remarks at a City Council meeting that "a small group of malcontents that by using the recall process attempted to overthrow the government of Willoughby Hills" and that the state-

ment is also alleged to have been published in a newspaper. Petitioner claimed that this statement was also defamatory.

Two sets of Requests for Admission were submitted to Petitioner which went unanswered.

A Motion for Summary Judgment based upon the Requests for Admission was filed on behalf of Respondents Byron, Schaefer, DeFrank, Moorehead, O'Ryan, O'Donnell, Kraincic and Monzula.

The trial court granted Summary Judgment and the decision was affirmed by the Court of Appeals. Petitioner appealed to the Ohio Supreme Court. That court *sua sponte* dismissed Petitioner's appeal for want of a substantial constitutional question and overruled Petitioner's motion for an order directing the Court of Appeals to certify its record.

Petitioner now seeks a writ of certiorari and Respondents file this Brief in Opposition to that Petition.

ARGUMENT

I. INSOFAR AS THE ISSUE OF DEFAMATION WAS ADJUDICATED IN AN EARLIER SUIT, PETITIONER'S SUIT IS BARRED UNDER THE DOCTRINE OF RES JUDICATA.

This case stems from a suit filed by Petitioner in which he alleged that Respondents had defamed him. The alleged defamation occurred as a result of statements made by Respondents supposedly aimed at a group of residents within the City, of which Petitioner was a part concerning an election recall petition drive.

Several members of the group, excluding Petitioner, brought suit against Respondents in *Macko v. Byron,* No. 77-CIV-0620 (Lake Co.) (Exhibit A) alleging that they had been defamed by the Respondents' statements. In *Macko,* the court found that the statements allegedly made by Respondents were true, and that truth of the matter was an absolute defense to the residents' defamation allegations. *Macko v. Byron,* Opinion, pp. 9-10 (App. pp. A8-A9).

Discovery at the trial court identified the privity between Petitioner and the plaintiffs in *Macko v. Byron* pursuant to Ohio Civil Rule 36 Requests for Admission. Ohio Civil Rule 36(A), like its federal counterpart, provides that Requests for Admission for which no objections have been filed are deemed admitted. *See also: St. Paul Fire & Marine Ins. Co. v. Battle,* 44 Ohio App. 2d 261 (Cuyahoga Co. 1975). (Request for Discovery (Second Set) Requests for Admission Nos. 7, 10, and 27.)

As a result of this identity of interest, Petitioner is collaterally estopped from relitigating the very same issues which were litigated in the earlier suit.

Because the issue of the truth of the statements alleged to have been made by Respondents has been determined, Petitioner is estopped from pursuing his defamation suit. If an issue of fact or law actually is litigated and determined by a valid final judgment, the determination is conclusive in a subsequent action between the parties and their privies whether on the same or a different claim. *Hicks v. De LaCruz,* 52 Ohio St. 2d 71 (1977). An identity of the parties and their privies necessitates looking at the real parties in interest. *Trautwein v. Sorgenfrei,* 58 Ohio St. 2d 493 (1979).

Where the court in *Macko v. Byron* found that the alleged defamatory statements were true and thus afforded a complete defense to Respondents, Respondents are afforded the finding of the court in the case at bar and Petitioner may not relitigate the issue of whether the statements were true.

Therefore, Petitioner's Petition for Certiorari is barred by *res judicata* and should be denied by this Court.

II. THE CLAIMED DEFAMATORY STATEMENTS ATTRIBUTED TO RESPONDENTS WERE MADE WITHIN THE SCOPE OF THEIR OFFICIAL DUTIES DURING THE COURSE OF COUNCIL MEETINGS, WERE RELEVANT TO THE SUBJECT THEN UNDER DISCUSSION, AND WERE ABSOLUTELY PRIVILEGED.

Petitioner's Complaint stemmed from an attempted recall of elected officials within the City of Willoughby Hills, Ohio. Generally, Petitioner alleged that he was defamed by remarks and a letter written by the Law Director, Mr. Byron, to the Ohio Secretary of State, and by statements made by Mayor Schaefer and City Councilman O'Ryan.

Uncontroverted evidence submitted to the trial court showed that the writings made by Mr. Byron consisted of a letter signed by Mr. Byron in his official capacity as Law Director of the City. That letter was read during the course of a City Council meeting pursuant to Mr. Byron's duties as Law Director and referred to irregularities in the recall petitions. Statements attributed to Mr. Byron were in reference to his advice to the City Council to attempt to recoup the money expended by the City in defending the recall action. (Affidavit of Mr. Byron and Request for Discovery (Second Set) Request for Admission No. 24.)

The uncontroverted evidence further showed that the alleged defamatory remarks made by Councilman O'Ryan pertained to statements made during the course of a council meeting which were relevant to the subject then under discussion, the irregularities in the attempted recall. (Request for Discovery (Second Set) Request for Admission No. 19.)

Statements made by a public official during the course of a council meeting and relevant to the subject matter then under discussion affords the public official an absolute privilege in the making of those remarks, and thus constitutes a complete defense to a claim of defamation. *Costanzo v. Gaul,* 62 Ohio St. 2d 106 (1980). Furthermore, a communication made by the law director of a village or municipality in his official capacity is afforded an absolute privilege. *Flynn v. Relic,* Case No. 41404 (Cuyahoga Co. Ct. App., June 26, 1980 (Exhibit B).

The writings and remarks attributed to Respondents are absolutely privileged because they were made by public officials during the course of a council meeting and were relevant to the attempted recall. Also, the letter signed by Respondent Byron is absolutely privileged because it, too, was made in Mr. Byron's official capacity as law director and related to official City affairs. Therefore, the statements alleged to be defamatory are absolutely privileged and are a bar to Petitioner's suit for defamation.

Thus, Petitioner's Petition for Certiorari should be denied.

III. PETITIONER WAS NOT DENIED DUE PROCESS AND EQUAL PROTECTION OF THE LAW BY THE TRIAL COURT.

Though Petitioner's Brief is not clear, Respondents assume that Petitioner's accusations of "inferior courts disregard[ing] evidence, rules and procedures" refers to the trial court's granting of Respondent Monzula's Motion for Leave to File Answer Instanter and the trial court's determination that it need not rule on Petitioner's Motion for a Change of Venue. Neither action of the trial court denied Petitioner equal protection or due process of law.

A. The Trial Court Did Not Abuse Its Discretion in Allowing Respondent Monzula to File Her Answer Instanter and Thus Did Not Deny Petitioner Equal Protection and Due Process of Law.

Petitioner claims that he was denied equal protection and due process of law because the trial court permitted Respondent Monzula to file her Answer Instanter.

The court granted Respondent's Motion to File her Answer Instanter because the record reflected that the omission of Respondent Monzula's name from the list of seven defendants within the caption of the Answer was an oversight. Respondent Monzula had entered an appearance in her defense and participated in the hearing to the same extent as the other Respondents. Furthermore, Petitioner failed to show how he had been prejudiced by Respondent's oversight.

Ohio Civil Rule of Procedure 6(B)(2) provides that a party may request an extension of time after the expiration of a period of time and the court may exercise its discretion in granting that extension. Specifically, some

showing of excusable neglect is a necessary prelude to the filing of a late answer. *Miller v. Lint*, 62 Ohio St. 2d 209 (1980).

Where the caption in the Answer merely omitted one of seven defendants represented by the same counsel through an oversight, the court was presented with the requisite showing necessary to exercise its discretion pursuant to Ohio Civ. R. 6(B). By exercising that discretion before granting summary judgment to all Respondents, absent a showing of prejudice by Petitioner, Petitioner was not denied equal protection or due process of law.

Therefore, this Court should deny Petitioner's Petition for Writ of Certiorari.

B. When Respondents Were Awarded Summary Judgment, the Issue of Venue Became Moot and There Was No Need for the Court to Rule on Petitioner's Motion. Thus, Petitioner Was Not Denied Equal Protection or Due Process of Law.

On September 4, 1980, a Motion for Summary Judgment was filed on behalf of all Respondents. The Motion was based on uncontroverted evidence submitted to the trial court in the form of Affidavits and unanswered Requests for Discovery. Subsequently, Petitioner opposed the Motion.

On October 14, 1980, Petitioner filed a Motion for a Change of Venue.

On October 17, 1980, the court granted Respondents' Motion for Summary Judgment.

Ohio Civil Rule of Procedure 3(C)(4) provides for a change of venue "when it appears that a fair and impartial

trial cannot be had" in the court in which the suit is pending.

Once the court granted the Motion for Summary Judgment, the court knew at that point that the case would not be going to trial, and thus, there was no need for the court to determine the merit of Plaintiff's Motion for a Change of Venue.

Therefore, Petitioner was not denied due process and equal protection of the law when the court did not rule on his Motion and Petitioner's Petition for Writ of Certiorari should be denied.

CONCLUSION

Respondents respectfully request that this Honorable Court deny jurisdiction. Petitioner is estopped from attempting to obtain yet another determination on the issue of whether Respondents were acting within the scope of their official public offices, and therefore, any remarks or writings made by Respondents are privileged and an absolute defense to a suit for defamation. Furthermore, Petitioner was not denied due process and equal protection of the law when the trial court properly exercised the discretion vested in it.

Respectfully submitted,

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APPENDIX

OHIO CIVIL RULES OF PROCEDURE

Rule 36(A)

(A) Request for admission. A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26(B) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within a period designated in the request, not less than twenty-eight days after service thereof or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer, or deny only a part of the matter of which an admission is

requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; he may, subject to the provisions of Rule 37(C), deny the matter or set forth reasons why he cannot admit or deny it.

The party who has requested the admissions may move for an order with respect to the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pretrial conference or at a designated time prior to trial. The provisions of Rule 37(A)(4) apply to the award of expenses incurred in relation to the motion.

Rule 6(B)

(B) Time: extension. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the

expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rule 50(B), Rule 59(B), Rule 59(D) and Rule 60(B), except to the extent and under the conditions stated in them.

Rule 3(C)(4)

(4) Upon motion of any party or upon its own motion the court may transfer any action to an adjoining county within this state when it appears that a fair and impartial trial cannot be had in the county in which the suit is pending.

EXHIBIT A

OPINION OF THE COURT OF COMMON PLEAS OF LAKE COUNTY, OHIO IN JOANNE MACKO, ET AL. v. BARRY M. BYRON, ET AL.

(Rendered February 14, 1980)

Case No. 77-CIV-0620

IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

JOANNE MACKO, *et al*,
Plaintiffs,

vs.

BARRY M. BYRON, *et al*,
Defendants.

Transcript of the Opinion of the Court Regarding the Above Case Heard on Thursday, February 14, 1980, Before the Honorable John M. Parks, Judge of Said Court.

* * * * *

[2] The Court: Please sit down.

Ladies and gentlemen, at the close of the plaintiffs' case-in-chief, the defendant Byron made a Motion for Directed Verdict to dismiss Count III of the Amended Complaint with prejudice. This matter was argued this morning before the Court.

The Court, after thoroughly reviewing the matter, finds that it is well taken and therefore it is granted. The plaintiffs' last remaining count in their Amended Complaint is dismissed and this case is concluded.

The Court finds that the remaining defendant did not publish a libelous letter. The plaintiffs have failed to establish the necessary elements of the cause of action in libel. As a result, their case must be dismissed for the defendant has no liability.

The plaintiffs have failed to establish four essential elements of their cause of action. First, they have failed to show [3] that the letter of September 15, 1976, was libelous by aid of innuendo.

Second, the plaintiffs have not overcome the three privileges Mr. Byron possessed in this situation. These privileges were: (1) his capacity as an attorney representing the city in a lawsuit; (2) at the same time, he was a member of the executive branch of the city's government acting in his official capacity; and (3) the letter was read at an open meeting of council—city council in due course of legislative proceeding.

Third, plaintiffs Macko and Szabo are public figures in this controversy. As public figures, they may only be defamed based on a showing of actual malice, which is knowledge by the defendant of the falsity of the letter or reckless disregard for its truth. The Court finds that the allegations in the letter were true and thus actual malice was not established.

Fourth, the allegations contained in the letter of September 15th were true. Truth is an absolute defense to a libel action. A brief explanation of these legal [4] reasons for dismissal is necessary.

The first ground for dismissal is plaintiffs' failure to show an action for libel per quod. In Ohio, there have long been two types of libelous statements—libel per se and libel per quod.

Libel per se means libel of itself or upon the face of a publication, whereas libel per quod is libel by an interpretation through an innuendo between an innocent

or harmless meaning and a libelous one. Where the words of a publication are not ambiguous or uncertain as to their definition, it is the sole function of this Court to determine whether such words constitute libel per se or libel per quod.

This Court determines, as a matter of law, that Mr. Byron's letter of September 15, 1976, could only be libelous per quod. That is, it can be libelous only by way of the knowledge by some third party of the extrinsic facts of the recall movement. Where words of a publication are not of themselves libelous, but are claimed to be so by innuendo, it is for this Court to determine **[5]** whether such words may reasonably be construed as constituting libel per quod so as to present a jury question as to their meaning.

This Court determines that the words of this letter may not be reasonably construed as constituting a libel per quod or a libel per se. Thus, there is no question for the jury to consider.

A publication can be libel per quod where a third person, with knowledge of the surrounding facts finds that the reputation of the person written about, in this case the plaintiffs, had his reputation harmed, his esteem in the community lowered, or other persons were deterred from dealing with him.

The plaintiffs must also show that the defendant acted with express malice. That is, that the defendant must have published this letter with an express design to injure based on ill-will, hatred or revenge.

Lastly, a libel per quod suit requires that the plaintiffs prove special damages. **[6]** Special damages occur when particular contracts, sales, customers, patients, clients or economic opportunity are lost as a result of the defamatory statement. In other words, there must be proof of a pecuniary loss of some substantial or material advan-

tage. None of the plaintiffs have shown any of these requirements.

There has been an insufficiency of evidence by the plaintiffs to show: (1) any harm to their reputation; (2) any lowering of their esteem in the community; (3) any lost or deterred dealings with the public; (4) that Mr. Byron acted with any express malice in preparing the letter; and finally, as plaintiffs admit, they have not proved special damages. While the plaintiffs did produce evidence, by way of a third person, that the letter did refer to them, they produced no evidence that as a result of this knowledge any of the third persons felt that plaintiffs' reputations were harmed, their esteem in the community lowered or that they deterred social or business dealings with the plaintiffs. Without such evidence no [7] defamatory impact has been established.

The second basis for granting the defendant's motion is that the preparation and publication of this letter by Mr. Byron was privileged. There are three privileges that protect Mr. Byron.

First, he was an attorney representing a client in anticipation of litigation. An attorney is absolutely privileged to publish false and defamatory matter of another in communications preliminary to a proposed judicial proceeding, or in the institution of or during the course and as part of a judicial proceeding in which he participates as counsel.

Mr. Byron received the letter of September 9, 1976, and became aware of the impending Supreme Court suit. His letter of September 15, 1976, was a relevant communication to the appropriate authority preliminary to a proposed judicial proceeding in which, as law director, he would participate as counsel. When the letter was first prepared and later read at the council meeting, Mr. Byron was shielded by executive privilege. [8] This

privilege attaches to the members of an executive department, regardless of the level of government, if their statements, even if made with express malice, are pertinent and relevant to the matter at issue and within the scope of his responsibilities.

The final privilege that protects the defendant from any liability from the reading of the letter at the council meeting is the legislative privilege. Matters that are published in the due course of legislative proceedings and are pertinent and relevant to the matters under inquiry are absolutely privileged, even if they are made maliciously and are false. The subject matter of this letter, requesting an investigation by a neutral observer into the petition irregularities, was pertinent and relevant to the then pending or impending Supreme Court suit. City council had to inquire into a defense of that suit either at that meeting or within the near future. The matter was either under inquiry or would soon be so.

The third reason for granting Mr. **[9]** Byron's motion is the failure of plaintiffs Macko and Szabo to establish actual malice on the part of the defendant in writing the letter.

These two plaintiffs are public figures for they have thrust themselves to the forefront of a particular public controversy in order to influence the resolution of the issues involved. In fact, Mrs. Macko and Mr. Szabo created this controversy by initiating the recall campaign. As public figures, they may only recover damages for libel upon a showing of actual malice.

Actual malice is, in this regard, knowledge by the defendant that the allegations in the letter were false or a reckless disregard on the part of Mr. Byron as to the letter's truthfulness. Plaintiffs have shown neither of these elements.

The evidence has disclosed that the incidents referred to in the letter were true and that the defendant prepared this letter only after the mayor and other members of council conducted preliminary investigation [10] discovering these admitted irregularities. This evidence does not establish reckless disregard for the truth.

The final basis for dismissing this suit is the absolute defense to any libel action—the truth of the matter alleged or stated. Plaintiffs themselves admitted that the incidents referred to in the letter did in fact occur. They were true. Truth of the matter defeats any claims of libel of imputation of a crime. The fact that the indictments were dismissed does little to rebut plaintiffs' own admissions that the acts alleged in the letter were true and were committed by the plaintiffs.

For these reasons, the suit must be dismissed against the plaintiffs, even after construing the evidence most strongly in favor of them. The Court finds that on these determinative issues, reasonable minds can come to only one conclusion upon the evidence submitted and that conclusion is adverse to the plaintiffs.

The jury is hereby discharged and the suit is dismissed with prejudice. The [11] plaintiffs will bear the costs of this action.

* * * * *

EXHIBIT B

JOURNAL ENTRY AND OPINION OF THE COURT OF APPEALS OF CUYAHOGA COUNTY, OHIO IN LAWRENCE J. FLYNN v. JOHN D. RELIC, ET AL.

(Dated June 26, 1980)

No. 41404

COURT OF APPEALS OF OHIO
EIGHTH DISTRICT, COUNTY OF CUYAHOGA

LAWRENCE J. FLYNN,
Appellant,

vs.

JOHN D. RELIC, *et al.*,
Appellees.

JOURNAL ENTRY AND OPINION

STILLMAN, *P.J.*:

This cause came on to be heard upon the pleadings and the transcript of the evidence and the record in the Common Pleas Court, and upon consideration, the court finds no error prejudicial to the appellant and therefore the judgment of the Common Pleas Court is affirmed. Each assignment of error was reviewed and upon review the following disposition made:

On June 23, 1978, Lawrence J. Flynn instituted an action for libel and slander by filing a complaint against John D. Relic and Lawrence I. Byrnes in the Cuyahoga County Common Pleas Court. The complaint alleged that

on June 23, 1977, John D. Relic, Finance Director of Mayfield Village, and Lawrence I. Byrnes, Law Director of Mayfield Village, drafted and filed before the Council of Mayfield Village a document entitled "Complaint By Finance Director Upon Affidavit" which accused Lawrence J. Flynn, a councilman, of forgery, in violation of R.C. 2913.31, having an unlawful interest in a public contract, in violation of R.C. 2921.42(A), and dereliction of duty, in violation of R.C. **[2]** 2921.44(E). The complaint further alleged that the charges leveled against Flynn were unwarranted, false, libelous, slanderous, deceitful, purely political, and made maliciously. The complaint also alleged that the charges were published in newspapers and on radio and television thereby causing Flynn to experience embarrassment, mental anguish, nervousness, sleeplessness, and humiliation. The complaint included a request for compensatory damages in the amount of fifty thousand dollars and punitive damages in the amount of one hundred thousand dollars.

Relic and Byrnes filed an answer on August 1, 1978, admitting that in June of 1977, they presented to the Council of Mayfield Village a document which charged Flynn with several violations of state law. Relic and Byrnes denied the remaining allegations contained in Flynn's complaint. As defenses, Relic and Byrnes asserted that they had acted within the scope of their duties and authority and that there had been probable cause for the charges.

On December 1, 1978, Relic and Byrnes filed a third-party complaint against Mayfield Village, seeking reimbursement for any amount that might be recovered by Flynn. Mayfield Village submitted an answer on January 24, 1979, denying liability.

On June 1, 1979, Relic and Byrnes filed a motion for summary judgment. The motion was supported by seven exhibits, including the "Complaint By Finance Director Upon Affidavit", which stated:

> Complainant Finance Director, being duly sworn, states that John D. Relic has filed an Affidavit, a copy of which is attached hereto, stating that Lawrence J. Flynn on or about December 26, 1975 presented an invoice to Mayfield Village for the payment of services to T. Hansen in the amount of $594.25 which invoice was a forgery in violation of Revised Code Section 2913.31; that said invoice was designed to conceal an interest **[3]** of Lawrence J. Flynn in the profits or benefits of a public contract with Mayfield Village, in violation of Revised Code Section 2921.42 (A)(4); that said Lawrence J. Flynn while serving as a Councilman of Mayfield Village was served a notice in writing on or about April 14, 1976 to appear with or without counsel to testify before the Finance Committee of Mayfield Village on April 29, 1976 at 7:30 p.m. with regard to the "T. Hansen" invoice; that he failed to appear which refusal is a violation of his oath of office, gross misconduct and malfeasance in office in violation of Revised Code, Section 2921.44 (E).

Relic and Byrnes maintained that the pleadings and exhibits demonstrated that there was no genuine issue as to any material fact and that they were entitled to judgment as a matter of law for the reason that the communication, namely the "Complaint By Finance Director Upon Affidavit", had been absolutely privileged. On June 18, 1979, Mayfield Village joined in the motion for summary judgment.

On July 5, 1979, Mayfield Village filed a suggestion of death, informing the court that Relic had died on June 21, 1979. On July 13, 1979, Relic's attorney filed a supplemental brief in support of the motion for summary judgment, contending that pursuant to R.C. 2311.21, Flynn's action abated as to Relic on the date of Relic's death.

On August 9, 1979, Flynn filed a motion to substitute party defendant, requesting the court to revive the action against Relic's executrix, Lillian J. Relic. Thereafter, Flynn submitted a brief in opposition to the motion for summary judgment. The brief was accompanied by an affidavit which stated:

> I, LAWRENCE FLYNN, being first duly sworn depose and say that:
>
> 1. I am a Councilman for Mayfield Village and was same on June 23, 1977 when a complaint was filed against me;
>
> 2. I never misrepresented or fraudulently induced the Village into paying for services rendered by me;
>
> **[4]** 3. Each and every charge brought against me is untrue and not based on actual conduct or omissions by this affiant;
>
> 4. Based on personal knowledge, I believe the charges were inappropriate, unnecessary, polital[sic], malicious, fraudulent and made without legislative authority.

In the brief, Flynn argued that his cause of action against Relic had survived the death of Relic. Flynn further argued that the defense of absolute privilege was not available to Relic and Byrnes.

The court granted the motion for summary judgment on September 4, 1979. In its journal entry, the court stated:

> Defendants' Motions for Summary Judgment heard: Granted as to both defendants. Abated by death of John D. Relic pursuant to R.C. 2311.21. Complaint is dismissed at plaintiff's costs.

Flynn timely filed a notice of appeal. One error has been assigned:

> The Trial Court erred by granting Summary Judgment in favor of the defendant-appellees:
>
> A. The evidence before the trial court raised genuine issues as to whether or not the defendant-appellees were absolutely privileged from liability for their acts.
>
> B. The death of defendant-appellee Relic merely necessitated the reinstating of the claim against the deceased's executrix and same was duly complied with.
>
> C. The death of defendant-appellee, Relic, did not abate the claim for relief then pending against the codefendant-appellee.

With respect to the issue of abatement, the common-law rule was that upon the death of a party, a pending action, as it related to the deceased party's interest, abated, and if the cause of action itself survived death, a new action had to be commenced by or against the personal representative of the deceased party. *Carter v. Jennings* (1873), **[5]** 24 Ohio St. 182; *Chilcote v. Hoffman* (1918), 97 Ohio St. 98; *Joyce v. Columbus* (1936), 21 Ohio Law Abs. 649. The common-law rule was modified by R.C. 2311.21, which states:

> Unless otherwise provided, no action or proceeding pending in any court shall abate by the death of either or both of the parties thereto, except actions for libel, slander, malicious prosecution, for a nuisance, or against a judge of a county court for misconduct in office, which shall abate by the death of either party.

Thus, R.C. 2311.21 retains the common-law rule as to an action for libel or slander. Applying the statute, the Ohio Supreme Court has held that where a defendant in an action for slander dies during the pendency of the action, the action abates. *Billingsley v. Townsend* (1937), 132 Ohio St. 603.

An action which abates under R.C. 2311.21 can be brought anew by or against the decedent's personal representative only if the cause of action survives death. *Joyce v. Columbus, supra.* R.C. 2305.21, which is concerned with survival of causes of action, provides:

> In addition to the causes of action which survive at common law, causes of action for mesne profits, or injuries to the person or property, or for deceit or fraud, also shall survive; and such actions may be brought notwithstanding the death of the person entitled or liable thereto.

A cause of action for libel or slander did not survive at common law. *Long v. Hitchcock* (1827), 3 Ohio 274. Survival under R.C. 2305.21 depends upon whether or not a cause of action for libel or slander constitutes an action for "injuries to the person".

In construing similar statutes, courts in other jurisdictions have held that the term "injuries to the person" means physical injuries. *Billingsly v. St. Louis, I.M. &*

S. Ry. Co. (1907), 84 Ark. 617; *Reed v. Real Detective Pub. Co.* (1945), 63 Ariz. 294. The court in *Reed v. Real* **[6]** *Detective Pub. Co., supra,* concluded the term "injuries to the person" does not encompass injuries to character or reputation, such as libel.

We find the reasoning of *Billingsly v. St. Louis, I.M. & S. Ry. Co., supra, and Reed v. Real Detective Pub. Co., supra,* persuasive. We note that the Ohio Supreme Court has declared that an action for malicious prosecution is not one for "injuries to the person" and therefore does not survive under R.C. 2305.21. *State ex rel. Crow v. Weygandt* (1959), 170 Ohio St. 81. Accordingly, we conclude that an action for libel or slander does not constitute an action for "injuries to the person" and therefore does not survive the death of the person wronged or the tortfeasor.

In the instant case, Lawrence J. Flynn brought an action for both libel and slander against John D. Relic and Lawrence I. Byrnes. Relic died during the pendency of the action. Thus, the action abated as to Relic, pursuant to R.C. 2311.21. Since a cause of action for libel and slander does not survive under R.C. 2305.21, Flynn is precluded from commencing a new action against Relic's executrix or substituting her as a party.

We find that the trial court did not err in granting summary judgment as to Relic on the ground that the action abated. However, the court erred in entering summary judgment in favor of Byrnes on the basis of abatement.

We must next determine whether or not Byrnes enjoyed an absolute privilege as to the communication made to the Council of Mayfield Village. It is well settled that

absolute privilege applies to legislative proceedings, judicial proceedings, official acts of the executive offices of state or nation and acts done in the exercise of military or naval authority. *Bigelow v. Brumley* (1941), 138 Ohio St. 574; *McChesney v. Firedoor Corp.* (1976), 50 Ohio App. 2d 49. Courts have extended the **[7]** absolute privilege to a statement made by a board of county commissioners relative to official acts of the county surveyor [*Tanner v. Gault* (1925), 20 Ohio App. 243], to statements made by the mayor and chief of police of a village in connection with a tavern operator's request for renewal of a liquor permit [*Shade v. Bowers* (1962), 93 Ohio Law Abs. 463], and to utterances made by members of local governing bodies during the course of official proceedings [*Costanzo v. Gaul* (1980), 62 Ohio St. 2d 106]. Accordingly, we conclude that a communication made by the law director of a village or municipality in his official capacity should be afforded an absolute privilege.

In the present case, Byrnes advised Relic to submit the matter of the propriety of Flynn's invoice to the Council of Mayfield Village for consideration. Byrnes also assisted Relic with the preparation of the "Complaint By Finance Director Upon Affidavit". In so doing, Byrnes acted in his capacity as the chief legal advisor and attorney for Mayfield Village and its officers and departments. Thus, Byrnes enjoyed an absolute privilege as to the "Complaint By Finance Director Upon Affidavit".

We find that the trial court did not err in entering summary judgment in favor of Byrnes on the basis of absolute privilege.

Accordingly, the judgment is affirmed.

[8] It is ordered that appellee(s) recover of appellant their costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

DAY, *J.*, (See attached concurring opinion, DAY, *J.*) and PARRINO, *J.*, concur in judgment only.

/s/ SAUL G. STILLMAN
Presiding Judge

DAY, *J.*, concurring in judgment only:

The majority opinion overrules the decision of the Supreme Court of Ohio decided in 1928 and followed by this court in 1952 establishing the Ohio rule on the abatement of pending actions and survival of causes of actions. Those cases make it perfectly clear that libel and slander are injuries to the person, see *Smith v. Buck* (1928), 119 Ohio St. 101 at 103-109, and therefore survives under R.C. §2305.21.

The crucial Syllabus in *Smith* completely supported by the text, states:

> "2. The words 'personal injury' by 'wrongful act,' of Section 11819, General Code, comprehend, among other injury to the person, injury by libel or slander."

That Section 11819, General Code, is a statute governing attachments is not a ground for distinguishing the meaning

of the same or equivalent words in R.C. §2305.21. This is the obvious conclusion from *Pecyk* where it was said:

> **[2]** "Upon the death of Walter Pecyk, the action, under Sec. 11397, G.C., abated and was dismissed. Thereafter, the . . . administrator of the estate of Walter Pecyk, filed, under favor of Sec. 11235, G.C. [the predecessor of R.C. §2305.21], an action against Semoncheck for the injury to the 'person' of Walter Pecyk by reason of the alleged slander. See *Smith v. Buck,* 119 Ohio St. 101, 162 N.E. 382, 61 A.L.R. 1343." (Brackets added.)

Unless we are prepared to use Arkansas and Arizona precedents to overrule the Supreme Court of Ohio and our own prior decisions, the majority position on the survival of causes of action should be abandoned.

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1. In implicit accord *Pecyk v. Semoncheck* (8th Dist. App. 1952), 105 N.E. 2d 61, 62.